FIRST INTERIM REPORT

SUBCOMMITTEE ON DISCOVERY ABUSE ISSUES, INCLUDING THE USE OF DISCOVERY MASTERS

I. INTRODUCTION

At most, if not all, of the Town Hall meetings held by the Professionalism Taskforce, many of the attendees, when identifying the practice areas where a lack of civility and/or unprofessional behavior frequently occurred, pointed to discovery and discovery dispute resolution as an area of serious and repeated concern. Our committee has canvassed, formally and informally, the different jurisdictions and individuals involved in the discovery dispute resolution process throughout the State. This *First Interim Report* sets forth the results that effort. It is formatted to present a view of what is currently occurring in practice, what is available and how it is used, and at least a beginning discussion on possible solutions. In reviewing the use of Masters, mediators or facilitators to expedite the dispute resolution process the conclusion is that, except for case specific situations, it is not happening. Our committee does solicit input regarding suggested practical solutions to this ongoing problem within the profession. The attachments are presented as written by the committee members for your review.

II. DISCUSSION OF CURRENT PRACTICE

The following is an article authored by Bob Fergusson and published in the *Maryland Bar Journal* on the subject and the use of lack of use of the discovery guidelines. It is self-explanatory.

THE USE AND ABUSE OF DISCOVERY AND THE APPLICATION OF DISCOVERY GUIDELINES[1]

The discovery process has become more and more the arena in which trial lawyers and would-be trial lawyers apply and develop their skills. For many reasons, in modern day litigation, there are fewer opportunities for trial lawyers to try cases and little opportunity for young lawyers who wish to become trial lawyers. That is not to say that there are not many trials. Indeed, our Courts are quite busy. But there now are many more lawyers and many criminal cases that clog the Courts. Experienced trial lawyers find themselves trying fewer cases. Young lawyers who wish to be trial lawyers have less opportunity to develop courtroom skills. As cases become more complex, lawyers spend more time in discovery. The proportion of time that lawyers spend in discovery to trial time I believe is much greater today than it was twenty years ago. Consequently, lawyers tend to use discovery as a means of applying, and all too often displaying, their adversarial skills. This has led to more contentiousness in discovery.

Depositions are conducted in an informal setting with a court reporter, the parties and the opposing lawyers. Unlike the courtroom, there is no referee to maintain order, decorum, civility and sometimes, common courtesy. The experience of examining or cross-examining a witness in this atmosphere can lead a lawyer, if unsupervised or unmentored, to develop a style of dealing with witnesses and opposing counsel that is incompatible with the style and demeanor that is necessary for a successful courtroom presentation where a judge is presiding and a jury is not only listening to the evidence, but watching the lawyers, and their antics, intensely. There is little disagreement in our profession that discovery abuse is present and a strong feeling that it has become more prevalent in the last twenty years. While hardly a scientific inquiry, my Google search on this subject is, nevertheless, interesting. In preparing this article I decided to search Google for "discovery," "discovery in litigation" and "discovery abuse." I had 13,700,000 hits for discovery, 512,000 hits for discovery in litigation, and 750,000 hits for discovery abuse. The inquiry using just "discovery" as the search parameter was clearly too broad, vague and certainly the results were burdensome (more on that later). A comparison of hits for discovery in litigation and discovery abuse certainly indicates that discovery abuse is the subject of much discussion and concern.

In this article, I will address the development of discovery guidelines, both in the Maryland State Court system and in the Federal system, some examples of discovery abuse, and practical ways to deal with them. I will also offer some observations on discovery and the use of discovery.

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[1] This article appeared in the Maryland Bar Journal, Volume XXXVII, Number 4, July/August 2004.

MARYLAND DISCOVERY GUIDELINES

In 1984 the Court of Appeals adopted a comprehensive revision to the Maryland Rules of Procedure. During the process leading up to the 1984 edition of the Maryland Rules, some proposals were made for rules that contained detailed limits on discovery and specific requirements addressing areas where discovery abuse had been experienced, such as late naming of experts, routine objections to Interrogatories, routine assertion of privilege, weak, non-specific assertions of privilege, excessive requests for production, excessive requests for admission and improper conduct at depositions. The Court of Appeals declined to adopt specific rules addressing these areas of concern, preferring to set forth rules that would broadly define the scope and use of discovery, procedures to resolve disputes, and provisions to seek other discovery related remedies.

In an effort to address some of the perceived areas of discovery abuse in some authoritative way outside of the Maryland Rules, the Maryland State Bar Association, Litigation Section, sought to develop discovery guidelines. The purpose of the guidelines was to serve as a guide for the conduct of counsel and parties, as well as a measure of the conduct of counsel and parties when discovery motions came before the court.

The Maryland Discovery Guidelines were developed in 1986 by a special committee of the Maryland State Bar Association Litigation Section. They were approved by the Litigation Section Council and then the Maryland State Bar Association Board of Governors. They were then submitted for approval to the Conference of Circuit Court judges. Since the Court of Appeals had declined to adopt rules dealing with specific discovery disputes, the Litigation Section and the Maryland State Bar Association Board of Governors decided that it would be inappropriate to submit the new Discovery Guidelines to the Court of Appeals for approval. It was thought that this would be inconsistent with its rule making function and its decision not to include such specific rules within the Maryland Rules of Procedure. Instead, they were submitted to the Conference of Circuit Court Judges, which, after review, and a presentation from the Maryland State Bar Association Litigation Section, endorsed the guidelines. The Conference of Circuit Court Judges felt that these guidelines would be useful, not only in directing the conduct of the parties and counsel during on-going discovery, but also a useful means of assessing the conduct of the parties and counsel when considering discovery disputes on motions submitted to the Court. The Michie Company published the guidelines two-volume set of the Annotated Code of Maryland, Maryland Rules of Procedure. The Maryland Discovery Guidelines can be found at the beginning of the 2-400 Rules in Volume I of the Maryland Rules of Procedure.

The Maryland Discovery Guidelines address discovery issues where disputes frequently arise by setting forth recommended conduct, identifying conduct that is presumptively proper and identifying conduct that is presumptively improper. Although some lawyers either are unaware of the guidelines or feel they are unenforceable because they are not rules issued by the Court of Appeals, many trial attorneys, myself included, have found them very useful in heading off discovery disputes and resolving discovery disputes. In my experience judges are aware of them, appreciate them and suggest them to counsel as a guideline for conducting discovery. Judges also consult them and apply them in measuring the conduct of counsel when considering discovery motions. If, at the beginning of litigation you make it clear to your opponent that you intend to conduct discovery in accordance with the discovery guidelines, that informs them of their existence if they are unaware and sets the ground rules for the conduct of discovery in the case. Some lawyers even attach a copy of the guidelines to their interrogatories, requests for production and notices of deposition.

The Maryland Discovery Guidelines are, in some way, a code of conduct. In my view, civility is one of the basic ground rules for professional, effective litigation and effective discovery. Civility codes which have subsequently been adopted by the Bar Association of Baltimore City, the Maryland State Bar Association and other local bar associations have a positive influence on the litigation process. Adversaries know that their peers, and the Judges who will judge their conduct, have a standard to use to measure their conduct. Similar codes of conduct and civility have been adopted by the American Bar Association and the American College of Trial Lawyers. The Code of Pretrial Conduct of the American College of Trial Lawyers (these can be found at www.actl.com) has a section that specifically addresses discovery practice and espouses a philosophy similar to that adopted by the Maryland Discovery Guidelines and the Discovery Guidelines of the United States District Court for the District of Maryland. While these codes of conduct and codes of civility are not authoritative rules, they are guidelines that should govern our conduct in discovery and should and will be used by Courts to judge our conduct when it is inappropriate.

DEPOSITIONS

Depositions are an important part of the discovery process. They give us the opportunity to see key witnesses face-to-face, to judge their demeanor and their credibility, and they give us the opportunity to develop our case and establish facts necessary to support the elements of our claim or defense. There are many factors involved in the decision to the take a deposition and that is beyond the scope of this article. Certainly the economics of the case will be a factor in determining whether all witnesses are deposed. Some lawyers feel that is not necessary. I know of some lawyers who take expert depositions simply for the opportunity of seeing the expert and making an assessment of

that expert's demeanor and credibility. Often there are other materials available from which a witness can be cross-examined at trial.

Having decided to take the deposition, you must plan for it and in that preparation anticipate problems that may occur during the depositions. You will have reviewed the file and facts relevant to the witness you are about to depose. You should also have researched the legal issues in the case so that you know what impact this witnesses' testimony will have on important elements of your case and how you can develop that testimony in a favorable way. If it is a lawyer that you have not encountered before, you should check with other lawyers to learn something about opposing counsel and how he or she will conduct himself/herself at deposition. If you know your opponent and know him/her to be a difficult and disruptive opponent, you should have a strategy in place to deal with that. You have prepared, you have a game plan, keep to that plan. Be professional and courteous, but be firm. If there are problems, make a record. You should advise opposing counsel of the Maryland Discovery Guidelines and, in particular, guideline no. 8 regarding the conduct of depositions. Speaking objections, coaching the witness, private conferences, showing documents to the witness are all irritating. They are improper tactics that you may need to deal with firmly and effectively. Do not lose your temper. Be professional. Without a judge present, you have to bring enough reason and pressure to bear to prevent these improper tactics from continuing and/or make a clear record of what transpires. Guideline 7 of the U.S. District Court requires the court reporter to record a description by the requesting person of any conduct in violation of the guidelines. When disruptive or improper conduct first occurs, admonish opposing counsel and again refer to guideline no. 8. See also the Committee note following Rule 2-415 indicating that speaking objections that coach the witness or disrupt the deposition are improper. Be persistent with the witness, stick to your game plan and get the information you need. When a speaking objection is made, I usually tell counsel that all that is needed is an objection and I do not need to hear their reasons for the objection. I admonish them that if they find it necessary to articulate their reasons for the objection on the record that they must first arrange to have the witness excused from the room and then put their objection on the record. After trying that once or twice, I find that it is usually effective and the speaking objections, coaching and like misconduct generally stops.

There are those attorneys that know no limits and those must be dealt with firmly. If the conduct persists, you can call the judge. Which judge do you call? Certainly, in Federal Court you would call the judge to whom the case is assigned or one of the magistrate judges in that division. Under the Maryland Rules you can either call a judge in the circuit where the action is pending or if the deposition is being taken in another county, call a judge in that county. Rule 2-432(e) provides that in discovery disputes relating to a deposition, you may seek relief from either the Court in which

the action is pending, or with the Court in the county in which the deposition is being taken. When I am dealing with an attorney that I anticipate will cause trouble and engage in improper conduct at the deposition, I sometimes make advance arrangements with the Court to advise that I may need to call the Court for assistance in resolving a dispute during the deposition. In Baltimore City, these inquiries can be directed to the judge in charge of discovery. In other counties these inquiries can be directed to either the judge to whom the case is assigned, or if there is no direct assignment, you should determine in advance which judge is the chamber's judge that day in that county. Call the judge's chambers alert the judge's law clerk or secretary about the time of the deposition and the location and that you may be calling in to seek assistance in resolving a discovery dispute. Discuss with the law clerk or the secretary whether the judge will be available or what procedure you may follow. If that judge is not available you should be able to find one that is available knowing that the options include not only the county where the action is pending, but also the county where the deposition is being taken.

After conducting the first deposition with an opposing attorney that has been difficult to control and who has engaged in improper conduct, if you have made a record you are then armed with the necessary foundation to seek relief from the Court regarding further depositions in that case. Your motion to be titled a Motion to Compel Discovery or a Motion for Sanctions or a combination of those including the request for an Order setting forth rules for the conduct of counsel and sanctions against counsel and the opposing party. You will use the record you have made and the Maryland Discovery Guidelines in support of your motion. In addition, there is case law to support a Motion for Sanctions and specific restrictions on the conduct of counsel. Probably one of the most widely cited cases is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. PA. 1993). There the Court set limits on the conduct of counsel who had been showing documents to the client during deposition, coaching the witness with speaking objections and having private conferences with the client during the deposition. In a similar case where there was abuse of conduct by counsel, an in unreported Opinion in *Baltimore Life Ins. Co. v. Knopfler*, United States District Court for the District of Maryland, Civil No. MJG-94-962, Judge Garbis not only sanctioned the offending attorney for improper conduct, but also issued an order setting specific guidelines for the conduct of the witnesses and counsel. In his order Judge Garbis specifically addressed the topic of speaking objections.

In 1993 certain revisions to the Federal Rules were made including a revision to Rule 30(d) that dealt with the problem of speaking objections. "Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." In September 1995 the United States District Court for the District of Maryland adopted local discovery guidelines. These can be found in Appendix C of the Local Rules obtained from the United States District Court

for the District of Maryland and then also published in Volume II of the Michie Publication of the Maryland Rules. Rule 5 of the Discovery Guidelines of the U.S. District Court for the District of Maryland deals with conduct at deposition and provides similar guidelines as the Maryland Discovery Guidelines. Both Maryland Discovery Guidelines and the discovery guidelines of the U.S. District Court for the District of Maryland provide cautions against instructing a witness not to answer, but acknowledge that such an instruction is appropriate, in some instances to protect the areas that are privileged and where there is continued improper, abusive or irrelevant questioning of the deponent.

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

While often under estimated, Interrogatories and Requests for Production of Documents are a useful and relatively inexpensive form of discovery. They are particularly useful in identifying witnesses who have knowledge of key information about the subject matter of the lawsuit and the location of documents and they are a means of identifying and producing key documents. All of this is useful, if not necessary, to identify and adequately prepare for depositions of key witnesses. Responding to Interrogatories and Requests for Production has also become an art form for litigators who spend more time in discovery than in Court and these forms of written discovery are a subject of much avoidance and abuse. The Maryland Discovery Guidelines and the discovery guidelines of the U.S. District Court for the District of Maryland address the appropriate manner in which to answer Interrogatories and preserve objections and privileges. Boilerplate objections and objections used to avoid responding to an Interrogatory are frowned on. A request for written discovery should be answered completely or if objected to, the grounds for the objection should be fully set forth. If grounds for the objection cover only part of the discovery request, the remainder of the discovery request should be answered. There is an excellent discussion of the appropriate means for responding to written discovery in a 1997 Opinion by U.S. Magistrate Judge Paul W. Grimm in *Jayne H. Lee, Inc. v. Flagstaff Industries Corp.*, 173 F.R.D. 651 (E.Md. 1997).

In responding to Interrogatories, both the Federal Rules and the Maryland Rules provide for the option to produce business records when (1) the answer may be derived from a review of the business records of the party upon whom the Interrogatory has been served and (2) the burden of deriving the answer is substantially the same for the party serving the Interrogatories as for the party served and (3) the party upon whom the Interrogatory has been served has not already derived the information requested. In the 1993 revisions to the Federal Rules of Civil Procedure, Rule 26(b)(2) was expanded to include a cost benefit analysis for responding to discovery requests. No longer is it enough to simply respond to an Interrogatory or a Request for Production of documents by simply claiming that the request is too broad and too burdensome or that the material is privileged. Now, an

objection to responding to discovery based on privilege must include the relevant information described in either the Maryland Discovery Guideline Nos. 5 and 6 and guideline no. 9 of the U.S. District Court for the District of Maryland. In responding that a request is too broad and too burdensome, some information must be provided to support that assertion and to allow the Court to make a determination using the cost benefit analysis. If, indeed, there is a burden and an expense, but the requesting party makes a case for the relevance and importance of disclosure, the Court in making this cost benefit analysis, may assess some or all of the expense of production on requesting party. See *Thompson v. Dept. of Housing & Urban Development*, 199 F.R.D, 168 (D.Md. 2001).

CONCLUSION

Both the Maryland Discovery Guidelines and the Discovery Guidelines of the United States District Court are currently being reviewed for revision. The Maryland Discovery Guidelines are interviewed by a subcommittee of the Litigation Section of the Maryland State Bar Association. The discovery guidelines of the U.S. District Court are being reviewed by the Federal Court Liaison Committee. The Discovery Guidelines of the U.S. District Court for the District of Maryland adopted in September 1995 had the advantage of other guidelines that preceded them and developing case law on the subject of discovery conduct and abuse. The Litigation Section of the Maryland State Bar Association has recognized the need to update the Maryland Discovery Guidelines and to take advantage of the wisdom of some of the changes adopted by the United States District Court for the District of Maryland the lessons that have been learned in applying both sets of guidelines. I believe that these discovery guidelines along with other rules of civility that have been adopted by the Bar Associations have positively influenced the conduct of counsel and have helped diffuse discovery disputes. They have also been a useful standard for the Courts in assessing the conduct of counsel and the parties when ruling on discovery motions.

Robert L. Ferguson, Jr.

III. **DISCOVERY GUIDELINES**

Attached is a brief history of the *Discovery Guidelines* as well as the Guidelines as set forth. A question is whether or not these Guidelines should be officially approved by the Court of Appeals and adopted as part of the Maryland Rules to put teeth into their worthy goals.

CHAPTER 400. DISCOVERY.

Discovery Guidelines of the State Bar.

The Discovery Guidelines of the Maryland State Bar Association were approved in 1986 by the Board of Governors of the Maryland Bar Association and by the Conference of Circuit Court Judges. These discovery guidelines were drafted by a special committee on the Maryland Discovery Guidelines and approved by the Litigation Section of the Maryland State Bar Association in February, 1990. Although they are not officially part of the Maryland Rules and have not been adopted or approved by the Court of Appeals, the following Guidelines, as revised, may, be of significant value in interpreting and applying Title 2, Chapter 400 of the Maryland Rules and are designed to eliminate unnecessary discovery disputes:

Guideline 1: Discovery Conference

Attorneys are encouraged to communicate with opposing counsel early in the case to discuss a plan and schedule for discovery.

Guideline 2: Stipulations Setting Discovery Deadlines

In appropriate cases, attorneys are "encouraged to enter into written discovery stipulations to supplement the Court's scheduling order, or if there is no scheduling order. The stipulation should address, among other things, the following:
(a) Date by which plaintiff will designate expert witnesses.
(b) Date by which defendant will designate expert witnesses.
(c) Date by which discovery depositions of experts shall be completed.
(d) Date by which rebuttal experts will be designated.
(e) Date by which a party must apply to the Court to show good cause why the designation of additional experts shall be permitted.
(f) A requirement that any expert consulted after the date of the stipulation may not be used as an expert at trial unless the witness is designated within a specified number. of days following the initial contact with the witness.
(g) Date by which all written discovery shall be served.
(h) Date by which all discovery must be concluded.

Guideline. 3: Stipulations Limiting Discovery Devices

Attorneys are encouraged in routine cases to enter into written stipulations or a Consent Order limiting discovery in the following areas:
(a) The number and length of depositions.
(b) The number of papers requesting the production of documents and the number of requests. within each paper. .
(c)The number of papers requesting the admission of facts or genuineness of documents and the number of requests within each paper.

Guideline 4: Delay in Responding to Discovery Requests

Attorneys should make good faith efforts to respond to discovery requests within the time prescribed by the Court rules. Attorneys wishing additional time to respond to discovery requests should contact opposing counsel as soon. as practical after receipt of the request, but no later than three days before the response is due. A request for additional. time should not be unreasonably refused. A stipulation and consent order for an extension of time containing the agreement of the parties should be filed by. [with] the Court by counsel requesting the additional time. The consent order should contain a statement by the party requesting the additional time that the discovery can be provided within the time stated in the stipulation.

Guideline 5: Guidelines in Responding to Interrogatories and Requests for Production.

(a) No part of an interrogatory or document request should be left unanswered merely because an objection is interposed to another part of an interrogatory.
(b) The practice of objecting to an interrogatory or document request or a part thereof while simultaneously providing a partial or incomplete answer to the objectionable part is presumptively improper. If an objection is made while simultaneously providing partial or incomplete responses, the answering party should state that the answer is partial or incomplete.
(c) Where a claim of privilege is asserted in objecting to any interrogatory, document request or part thereof and information is not provided on the basis of such assertion:

(1) The party asserting the privilege should, in the objection to the interrogatory or part thereof, identify with specificity the nature of the privilege (including work product) which is being claimed;
(2) The following information should be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:
(i) For oral communications:
(a) the name of the person making the communication and the names of persons present while the communication was made, and where not apparent, the relationship of the persons present to the person making the communication;
(b) the date and place of the communication; and
(c) the general subject matter of the communication.
(ii) For documents, including those requested at deposition:
(a) the type of document;
(b) general subject matter of the document;
(c) the date of the document; and
(d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian and any other recipient to each other.
(3) The party seeking disclosure of the information withheld may, for the purpose

of determining whether to move to compel disclosure, notice the depositions of appropriate witnesses for the limited purpose of establishing other relevant information concerning the assertion of privilege, including (i) the applicability of the privilege asserted, (ii) circumstances which may constitute an exception to assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege. The party seeking disclosure may apply to the court for leave to file special interrogatories or redepose a particular witness if necessary

Guideline 6: Assertions of Privilege at Depositions
Where a claim of privilege is asserted during a deposition and information is not provided on the basis of such assertion:
(a) The person asserting the privilege shall identify during the deposition the nature of the privilege, (including work product) which is being claimed; and
(b) Objection on the ground of privilege asserted during a deposition may be amplified by the objector subsequent to the deposition.
(c) After a claim of privilege has been asserted, the attorney seeking disclosure should have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exception to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege. The party asserting the privilege, in providing the foregoing information, shall not be required to reveal the information which is itself privileged or protected from disclosure. [2]

Guideline 7: Guidelines in Scheduling Depositions.
(a) Attorneys are encouraged to make a good faith attempt to clear deposition dates with all opposing counsel or parties before noting a deposition.
(b) Before agreeing to a deposition date, an attorney should attempt to clear the date with his client if the client is a deponent or wishes to attend the deposition, and with any witness the attorney agrees to attempt to produce at the deposition without the need to have that witness served with a subpoena.
(c) An agreed upon date is presumptively binding. An attorney seeking to change an agreed upon date should coordinate a new date before changing the agreed date.

Guideline 8: Deposition Questioning and Objections.
(a) An attorney should not intentionally ask a witness a question that misstates or mischaracterizes the witness' previous answer.
(b) An attorney should not intentionally ask a witness more than one question at a time. To insist upon an answer to a multiple part question after objection is presumptively improper.
(c) Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.
(d) An attorney should not question a deponent in such a manner as he knows or should know would serve merely to harass or annoy the deponent.

[2] U.S. District Court for the District of Maryland, Discovery Guideline No. 6.

(e) An attorney for a deponent should not initiate a private conference with a deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. To do so, otherwise, is presumptively improper. During breaks in the deposition no one should discuss with the deponent the substance of the testimony given by the deponent during the deposition; however, counsel for the deponent may discuss with the deponent whether a privilege should be asserted or other discussions of substance not relating to the substance of the testimony already given.[3]
(f) It is presumptively improper for an attorney to instruct a client not to answer a question at deposition unless: (1) There is a specific assertion of privilege in accordance with these guidelines,(2) There is abusive conduct in the questioning of which this question is apart with a specific identification of why the instructing attorney believes this to be so, or (3) The question is completely irrelevant or intended to embarrass the witness.
(g) If the attorney lodging an objection or instructing a witness not to answer believes that his objection or his instruction requires the assertion of facts or an explanation of the formal defect, which would in any way be instructive to the witness, then the witness should be excused while the objection or instruction is made.

Guideline 9: Objections at Depositions
Attorneys objecting to the form of the question at deposition are encouraged, if requested, to state the reason for the objection.

Guideline 10: Discovery Disputes
Attorneys are encouraged to communicate with each, other to make every good faith effort to resolve discovery disputes without Court involvement. Disputes that cannot be resolved should be submitted 'to, the Court promptly in order to avoid continuing the trial date.

IV. USE OF MEDIATORS/FACILITATORS IN DISCOVERY DISPUTES

This is the result of a survey of the different venues regarding the use of basically anyone other than a Judge to resolve discovery disputes. From this and other data obtained in seems clear that there is a discrepancy in the perception of the Judiciary and practitioners as to the extent or even existence of discovery dispute resolution issues. To report that there are no significant problems, when compared to the results of the Taskforce, demonstrates a problem itself. Recalling the Taskforce findings, it seems clear that at least some practitioners have given up trying in certain counties because of frustration over a perceived

[3] Id., Guideline 5(g)

lack of a meaningful resolution process (i.e. to be resolved by the trial judge on the day of trial).

ANNE ARUNDEL COUNTY
Judge Manck – No

BALTIMORE CITY

Judge Michael W. Pierson (ADR Judge) indicated that mediators are not used and that it had never occurred to him as the ADR Judge to utilized mediators for discovery disputes. He suggested that I speak with Judge Allison.

Judge Kaye A. Allison reported that in business and technology cases there have been occasions when a Special Master has been appointed. To the extent that it occurs, the Special Master is paid by the parties. With the issues of electronic discovery, significant fact finding is required in such cases. She shared with me that a battery of mediators had been pulled by the Court for the purpose of dealing with discovery disputes. She said that the Bar was not receptive to the use of mediators to handle discovery disputes. The reason the Bar was not receptive was that the use of mediators involved a process that was not fast enough.

CARROLL COUNTY
No, but the Clerk is aware of some attorneys agreeing to a mediator/facilitator on their own to resolve such issues. The Court is not involved in the process.

CECIL COUNTY
The Family Law coordinator reported that mediators are used in family law cases but not discovery disputes.

CHARLES COUNTY
Mediators are used for settlement purposes only.

FREDERICK COUNTY
No

HARFORD COUNTY
Judge William O. Carr reports that they do not use mediators or facilitators for resolution of discovery disputes. Those matters are handled by the Chambers Judge. Harford County is fortunate to have discovery disputes not be frequent enough to be a problem.

HOWARD COUNTY
No

MONTGOMERY COUNTY
The use of discovery Masters is ad hoc. When it has occurred, the Judge signs an Order appointing a "seasoned" attorney to act as a discovery Master. The parties pay for the Master's time on an hourly basis. The Master is empowered to make a recommendation only. That recommendation is usually followed by the Judge.

PRINCE GEORGE'S COUNTY
No

ST. MARY'S COUNTY
(William Tench – Court Administrator)
No

SOMERSET COUNTY
Somerset County just began the use of facilitators for the purpose of narrowing the issues. Somerset County expressed a keen interest in being a pilot program for any recommendation we would make in the nature of the use of mediators/facilitators for discovery purposes.

WASHINGTON COUNTY
Eunice Plank – Court Administrator
No. Discovery disputes in Washington County are rare. When they occur, the attorneys contact the Administrative Judge for resolution.

V. CURRENT MASTER'S SYSTEM

The judges of each Circuit Court have the authority to appoint a full-time Standing Master, a part-time Standing Master, and/or a Special Master pursuant to Courts and Judicial Proceedings Article 2-501 and Maryland Rule 2-541. Family Law Masters are governed by Maryland Rule 9-208 and Juvenile Masters are governed by Maryland Rule 11-111. Prior to July 2002, all Masters were County employees and were not employed in a like manner. Salaries, benefits and responsibilities varied greatly across the State. With the advent of a Family Division in the five most populous jurisdictions of Maryland, and Chief Judge Robert Bell's commitment to cases involving children and families, the Master's system began to evolve.

On July 1, 2002, the State of Maryland took over the Master system. Any Master hired on or after July 1, 2002 was mandated to be a State employee and was provided State salary and benefits. Any Master employed prior to July 1, 2002 had the option of becoming a State employee or maintaining their current County employment. Masters remaining in the County system had their salaries reimbursed to the counties by the State of Maryland.

Historically, and continuing today, there are Circuit Court judges opposed to the Master system. The opposition stems from the belief that appointing more judges instead of masters is the preferred choice. The problem with this belief is one of money and politics. Judges are more expensive than Masters and, under the current economic condition of the State, it is unlikely that the various Circuit Courts are going to be adding a significant number of judges.

DISCOVERY - MASTERS

Other than Cecil County, every jurisdiction has at least one part-time Master hearing cases on a regular basis. Discovery disputes are not being handled by the Masters unless a dispute arises during a hearing and needs an immediate ruling. Pre-trial discovery disputes are being handled and ruled upon by the Circuit Court Judges.

In Montgomery County a Special Master is employed to settle discovery disputes in complex civil matters. In the smaller jurisdictions, e.g. Garrett County, the Master will

act as an advisor to the Circuit Court Judge. This is done informally and privately with the Judge having absolute control over the final decision.

CRITERIA FOR USE

Under Maryland Rule 2-541 (b) (2) the Court may refer to a Master any matter or issue not triable of a right before a jury. Domestic relations matters can only be referred pursuant to Maryland Rule 9-208. Neither Rule specifically addresses discovery issues, but under the general powers provision of each rule, a Master may be directed to resolve a discovery dispute.

There has been much debate over the use of Masters and the authority granted to them. In my personal opinion, the Courts are divided into two segments: big jurisdictions versus small jurisdictions. Big jurisdictions are generally against the increased use of Masters for the simple reason that there is a need for more judges.

Masters are not judges and do not have the powers associated with a judge. The belief is that with the hiring of additional Masters, it is less likely that the need for additional judges will be filled.

In the smaller jurisdictions, which have almost no chance of getting additional judges, the appointment of full-time Masters has been a tremendous relief to the Circuit Court docket. Masters handle a significant percentage of the cases filed in each Circuit Court. The Master's Office in Garrett County handles a little more than 50% of all of the filings and conducts 80% of all of the hearings that take place.

Cecil County does not have a Master because of politics and money. Cecil County has three Circuit Court judges handling a caseload equal to 4.3 judges. Rather than accept a Master under the new statewide plan, the county held out for an additional Circuit Court Judge. The additional judgeship was denied, the state went into a financial crisis and no Master was appointed.

PRACTICALITY OF UTILIZING MASTERS TO RESOLVE DISCOVERY DISPUTES UNDER THE CURRENT RULES

A Master conducts a hearing or trial as a judge (with the exception of wearing a robe), but does not have the authority over the final decision. The Master makes specific

findings of fact, applies the law to those facts, and then makes a recommendation. Findings and recommendations are made on the record at the conclusion of the hearing and are part of a written report. The parties have a right to file exceptions to the Master's Report and Recommendation pursuant to specific rules contained within Rule 2-541 and 9-208 (see attached copies of the rules). If exceptions are not timely filed, the Circuit Court Judge is to review the entire file, read and consider the Master's Report and Recommendations, and then make an independent decision concerning the case.

If exceptions are timely filed within 10 days of the Master's Recommendations a transcript is prepared. The transcript is generally completed within 15-45 days of the exception filing date. An exception hearing is then scheduled before a Circuit Court Judge. This hearing is conducted solely on the issues raised on exceptions. The Court has the options of denying the exceptions, granting the exceptions and remanding the matter to the Master, ordering a trial de novo, etc.

This process can be time consuming and unwielding. The positive side of the Master system is that exceptions are filed in less than 3% of the cases statewide and in general, are rarely granted. The negative side of the Master system is that a party can further delay a case by exercising the right to file exceptions.

ECONOMIC ISSUES

In the last two years there have been significant cuts to the State budget and the likelihood of additional judges or masters being hired is slim at best.

An alternative would be the use of Special Masters specifically appointed to hear discovery disputes. The Special Masters compensation would come from the parties rather than the Court. A similar system is already in place with court ordered mediation in custody cases.

ACCEPTANCE BY THE JUDICIARY

A major hurdle will be the implementation of a statewide system. Standing Masters and Special Masters are appointed by the judge(s) of each individual county subject to approval by Chief Judge Robert Bell. Standing Masters, even though state employees, are at will employees and answer solely to the judges of their particular county. When the employer judge says jump, the master asks how high. When a judge from another jurisdiction, the Court of Special Appeals, or the Court of Appeals say

jump, the master goes to the county judge and asks not how high, but whether to jump at all. Circuit Court judges tend to be territorial and protective of their powers. If discovery masters are to be used, acceptance by the judiciary may be the greatest hurdle.

VI. COUNTY BY COUNTY LISTING OF MASTERS AND DUTIES

Attached is a list of the current Master's system and their duties. Note that only one jurisdiction uses a Master for discovery issues and that is on a special request basis. A description of Montgomery County's procedure is also presented. As good as it may be in a complex case situation it may not lend itself to a broader application in day to day disputes involving more ordinary cases if for no other reason that economics.

ALLEGANY COUNTY
1 Full-time Domestic and Juvenile Master
1 Part-time Master (child support cases only)

ANNE ARUNDEL COUNTY
5 Full-time Domestic and Juvenile Masters

BALTIMORE CITY
9 Full-time Juvenile Masters
3 Full-time Domestic Masters
1 Full-time General Master (Civil Motions)

BALTIMORE COUNTY
3 Full-time Domestic Masters
2 Full-time Juvenile Masters
1 Full-time Child Support Master

CALVERT COUNTY
1 Full-time Domestic and Juvenile Master

CAROLINE COUNTY
1 Part-time Domestic Relations Master (Shares a Full-time Master with Talbot, Queen Anne's and Kent Counties)

CARROLL COUNTY
1 Full-time Juvenile Master
2 Full-time Domestic Masters
1 Full-time Child Support Master

CECIL COUNTY – No Master

CHARLES COUNTY
2 Full-time Domestic and Juvenile Masters

DORCHESTER COUNTY
1 Part-time Juvenile and Domestic Master (3 Full-time Masters share Dorchester, Wicomico, Somerset and Worcester Counties)

FREDERICK COUNTY
1 Full-time Domestic and Juvenile Master

GARRETT COUNTY
1 Full-time Standing Master (Juvenile, Domestic and Civil)

HARFORD COUNTY
1 Full-time Juvenile Master
2 Full-time Domestic Masters

HOWARD COUNTY
3 Juvenile and Domestic Masters

KENT COUNTY
1 Part-time Domestic Relations Master (Shares a Full-time Master with Caroline, Queen Anne's and Talbot Counties)

MONTGOMERY COUNTY
4 Full-time Domestic Masters
1 Part-time Special Master (Reviews all pending motions and discovery)

PRINCE GEORGE'S COUNTY
1 Full-time Juvenile Master
5 Full-time Domestic Masters

QUEEN ANNE'S COUNTY
1 Part-time Master (Shares a full-time Master with Caroline, Kent and Talbot Counties)

ST. MARY'S COUNTY
1 Full-time Juvenile Master

SOMERSET COUNTY
1 Part-time Domestic and Juvenile Master (3 Full-time Masters share Dorchester, Wicomico, Worcester and Somerset Counties)

TALBOT COUNTY
1 Part-time Domestic and Juvenile Master (Shares a Full-time Master with Caroline, Queen Anne's and Kent Counties)

WASHINGTON COUNTY
1 Full-time Domestic Master

WICOMICO COUNTY
1 Part-time Domestic and Juvenile Master (3 Full-time Masters share Dorchester, Wicomico, Worcester and Somerset Counties)

WORCESTER COUNTY
1 Part-time Master (3 Full-time Masters share Dorchester, Wicomico, Worcester and Somerset Counties)

Montgomery County Procedure for Handling Discovery Disputes

I have researched the procedure used by the Circuit Court for Montgomery County to handle discovery disputes and I have spoken with one of the attorneys in Rockville who regularly handle appointments as a Special Master for discovery disputes from the Circuit Court for Montgomery County.

Typically, discovery motions in Montgomery County are handled in the same way they are in other counties where the Motions will be scheduled on the regular motions docket and a limited time, usually 30 minutes, allowed for argument. In more complex cases that are document intensive or which have difficult legal issues involved, some judges in the Circuit Court for Montgomery County will appoint a Special Master. This is a procedure that began to be used approximately five years ago under the leadership of then Administrative Judge Paul Weinstein. It has continued and is apparently well favored by the Circuit Court judges and practitioners.

Judges who are assigned Track IV cases use the Special Master process more frequently than others, although within the last two years I have learned that some Track III judges will assign a Special Master for discovery motions where they believe it will be too lengthy for the general motions docket. The appointment of Special Masters is used

sparingly and typically is for serious or complex cases, document intensive cases or cases where there are complicated issues of attorney/client or work product privilege. Occasionally, Special Masters will be appointed when attorneys can not get along and the Master is asked by the Circuit Court judge to sit through depositions and make rulings.

The practice followed in Montgomery County is to issue an Order appointing a Special Master pursuant to Rule 2-541(a)(2). A copy of that Rule is attached. The Order typically sets forth the hourly rate of compensation which in Montgomery County began at a rate of $200.00 an hour and is currently $250.00 an hour. Typically the Order will state that the fees are to be shared equally among the parties involved in the discovery and dispute unless otherwise ordered by the Special Master. From talking to some lawyers who act as Special Masters and judges in the Circuit Court for Montgomery County, there is no list of approved attorneys, but rather the judges are aware of attorneys who are interested in it and will look for litigators with experience or attorneys with special expertise in a particular area to appoint as Special Masters. There are about 4 or 5 experienced attorneys in Montgomery County who regularly handle matters as a Special Master. I spoke with one of them and he said that he and another one of his colleagues that handle similar matters do 2 to 3 Special Master referrals a month at the most. Typically what will occur is the Circuit Court judge will appoint the Special Master after the first motions hearing. This is the time when the Court will get a first look at the nature and extent of the discovery dispute and any complexities involved. The judge will usually call the referring attorney that same day and then send out an Order appointing him or her as a Special Master. The Order will usually stipulate that in Track IV cases the Order will usually specify that the Special Master will continue to remain as Special Master for that case until the conclusion of the matter and that in the future all discovery motions when filed, copy should be sent to the Special Master.

The Special Master will schedule a hearing either in person or by phone once the discovery dispute has been fully briefed. The Special Master will then issue a report either verbally or in writing pursuant to Rule 2-541(e). The parties have ten days from the time of the verbal or written report to file exceptions pursuant to Rule 2-541(g), but most give five days notice of their intent to file exceptions as required by 2-541(e). Once exceptions are filed, then it must go back to the Circuit Court judge for a hearing. This can delay the case. Based on my discussion with one of the attorneys who acts a Special Master in discovery

disputes, most parties do not file exceptions. He finds that exceptions are usually filed in areas relating to privilege or work product where those issues need to be preserved. Another reason that exceptions are not filed is that often parties do not read the rule and do not order a court reporter for the hearing. According to Rule 2-541(g) when exceptions are made the parties must provide a transcript to the Court or provide an agreed statement of facts. I assume that it will probably be difficult to provide an agreed statement of facts in most discovery disputes.

Speaking with lawyers, Special Masters and judges, the Circuit Court judges like the system, but that the litigants' reactions were mixed with probably 70% in favor and 30% somewhat unhappy with the system or the procedure. Having experienced this myself, I find it to be a good procedure for a case that has a significant exposure and is on Track IV assigned to a single judge. In Montgomery County, Track IV cases are automatically assigned to a single judge. The procedure allows the hearing to be specially set. It allows the Special Master to devote more time to complicated issues that the Circuit Court judge would not have and it allows for both telephone hearings or follow-up hearings by telephone which saves the litigants in their own attorneys' fees, although it will require some additional fees to the Special Master. I have not found in the cases that I have been involved in where a Special Master has been appointed, that the cost of the Special Master is inappropriate given the complexity of the disputes and the exposure in the case. Both the judges and the Special Masters agree that they should be used sparingly and only for serious, complex or lengthy issues. Referral to Special Masters should not be used to simply reduce the Courts' dockets. One judge noted that there had been some complaints to the Court by certain members of the Bar that the referral occurs too often and that it drives up their costs.

VI. **INTERIM CONCLUSION AND DISCUSSION**

In presenting this *First Interim Report* it is apparent that more needs to be done. First, it is clear that the Judiciary should be made aware of the discrepancy in perceptions. There ***is*** a problem that requires direct or indirect judicial involvement to resolve. There is a perceived need for expeditious and economical dispute resolution perhaps without initial

judicial involvement if appropriate protocols are established. Suggestions to be discussed are the use of existing Masters, volunteer discovery masters, mediators, or facilitators. Reprinting discovery opinions with the support of the Court of Appeals has been suggested as helpful. It is our suggestion that each Circuit adopt a specific procedure on this issue to meet the need at issue.